Office-Supreme Court, U.S.
FILED
SEP 30 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-315

In the
Supreme Court of the United States
OCTOBER TERM, 1983

DeVRY, Inc.,
Petitioner,

v.

JOE ANN McCLANDON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

ROSLYN C. LIEB,
Counsel for Respondent

Of Counsel:
Northwestern University Legal Clinic
339 East Chicago Avenue — Room 119
Chicago, Illinois 60611
Telephone: (312) 649-8576

The Scheffer Press, Inc.—(312) 263-6850

TABLE OF CONTENTS

Subject Index

	Page
Statement of the Case	2
Reasons for Denying the Writ	3
Conclusion	8

TABLE OF AUTHORITIES

Cases

Baldwin v. *Iowa Traveling Men's Assn.*, 283 U.S. 522 (1931) 5

Board of Governors v. *Illinois FEPC*, 78 Ill.2d 143, 399 N.E.2d 590 (1979) 2

Federated Department Stores, Inc. v. *Moitie*, 452 U.S. 394 (1981) 5

Logan v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982) 6, 7

Metropolitan Life Insurance Co. v. *Hansen*, 102 Ill. App.3d 354, 430 N.E.2d 57 (1st Dist. 1981) 5

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 6

People v. *Kidd*, 398 Ill. 405, 75 N.E.2d 851 (1947) 4

United Public Workers v. *Mitchell*, 330 U.S. 75 (1947) 6

Wilson v. *All-Steel, Inc.*, 87 Ill.2d 28, 428 N.E. 2d 489 (1981) 6

Constitutional Provisions and Statutes

U.S. Const. amend. XIV, §1 ..... 3, 6

Ill. Rev. Stat. ch. 48, §858.01(a) 2, 3, 4

Ill. Rev. Stat. ch. 48, §858.01a 2, 3, 5, 6

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

No. 83-315

DeVRY, Inc.,

Petitioner,

v.

JOE ANN McCLANDON,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FIRST JUDICIAL DISTRICT

Pursuant to United States Court Rule 22, Respondent Joe Ann McClandon files this brief in opposition to Petitioner's[1] petition for a writ of certiorari, and requests that the Court deny the petition. Respondent submits that the Appellate Court of Illinois, First Judicial District decided correctly the issues presented to it, and thus the January 10, 1983, and February 28, 1983 judgments do not warrant review by the Court. More particularly, the Appellate Court disposed of the issues that Petitioner raises in its petition according to established precedent and sound reasoning.

---

[1] Petitioner Bell and Howell Schools is now DeVry, Inc. (Petition's Br. at 1 n.1)

STATEMENT OF THE CASE

Petitioner's Statement of the Case omits and mischaracterizes certain aspects of this case which Respondent will attempt to clarify. Although the Illinois Fair Employment Practices Commission (Commission) failed to issue a complaint within 180 days of the timely filing of Respondent's discrimination charges, as dictated by Ill. Rev. Stat. ch 48, § 858.01(a), the Commission did issue a complaint upon a finding of substantial evidence. (App. A, p. 2a) The matter was then set for hearing before an administrative law judge. Over one year later, Petitioner instituted an action for declaratory and injunctive relief in the Circuit Court of Cook County. In response to the Commission's Motion to Dispose of that Action,[2] on July 2, 1980, the Circuit Court found that the Commission had no jurisdiction to proceed on Respondent's charges, but then dismissed Petitioner's action with prejudice and without costs. (App. I, p. 34a) After the Commission dismissed her complaint, Respondent filed a four-count complaint in state court, two counts of which were based on Ill. Rev. Stat. ch. 48, § 858.01a. This statutory provision was enacted to permit persons like Respondent the opportunity to proceed on their charges, but was held to be unconstitutional by the Illinois Supreme Court while Respondent's appeal was pending before the Appellate Court. (App. A, p. 3a).

Other than these noted points, the Statement of the Case adequately sets forth the history of this case.

---

[2] The Commission filed the motion after the Illinois Supreme Court had ruled in a different case that the Commission had no jurisdiction over charges unless it acted upon those charges within 180 days. *Board of Governors v. Illinois FEPC*, 78 Ill.2d 143, 399 N.E.2d 590 (1979).

REASONS FOR DENYING THE WRIT

THE ILLINOIS APPELLATE COURT'S DECISIONS ARE CONSISTENT WITH THIS COURT'S DECISIONS.

Contrary to Petitioner's contention in its petition, the Appellate Court correctly decided the issues before it. Petitioner argues in its petition that the Appellate Court's judgment should be reversed because the court failed to apply the principle of *res judicata* to the July 2, 1980 Order of the Circuit Court, thereby depriving it of its Fourteenth Amendment rights to due process.[3] Yet, as Petitioner concedes in its petition, although the court found that the Commission lacked jurisdiction, the court dismissed Petitioner's complaint (Petition at 3, App. I, p. 34a). Thus, Respondent was in the position of the prevailing party. At the time the Order was entered, the appeal rights, if any, lay with the Petitioner and not with Respondent.

Additionally, the Appellate Court determined correctly that the doctrine of *res judicata* had no bearing on the issues before it because the initial proceedings were brought pursuant to Ill. Rev. Stat. ch. 48, § 858.01(a) and the subsequent proceedings brought pursuant to Ill. Rev. Stat. ch. 48, § 858.01a. (App. A, B, pp. 1a-10a). The latter section provided that if an individual commenced an

[3] Petitioner's contention that it has a vested right in the July 2nd Order is unwarranted. That order was a dismissal with prejudice of Petitioner's action. If anything, it is Respondent who would have a vested right in the order.

action pursuant to § 858.01(a) and the Commission failed to act within the 180 days, then that individual could institute proceedings in the Circuit Court to obtain relief. The statute provided two separate avenues for seeking relief, the second dependent upon the failure of the first. The doctrine of *res judicata* fails to apply to this situation. 1B J. Moore & T. Currier, Moore's Federal Practice ¶ 0.415, at 2055 (2d ed. 1982) ("[s]ometimes a statutory change. . . creates a new cause of action or a new procedure for enforcing a right, . . . and to that extent diminishes the scope of the conclusive effect of a prior judgment or decree").

As the Appellate Court appropriately noted in its February 28, 1983 supplemental opinion:

> McClandon's arguments are directed at section 8.01a. Defendant's declaratory action was related to the jurisdiction of the FEPC to proceed on an administrative complaint filed after the 180-day period required by section 8.01(a). Ill. Rev. Stat. 1979, ch. 48, par. 858.01(a).
>
> Therefore, the effect of the declaratory action, if any (the action was dismissed rather than granted), was to defeat plaintiff's claim before the FEPC.
>
> • • • •
>
> The petition for rehearing is denied.

(App. B, p. 10a) The Court's opinion was based on well-established principles of state and federal law. The doctrine of *res judicata* attaches "[w]hen a former adjudication is relied upon as an absolute bar to a *subsequent* action. . . ." *People* v. *Kidd,* 398 Ill. 405, 408-09, 75 N.E. 2d 851, 854 (1947) (emphasis added). In other words, as this Court has stated, *res judicata* attaches in order " 'that there be an end of litigation; that those who have con-

tested an issue shall be bound by the result of the contest, and that *matters once tried shall be considered forever settled* as between the parties.'" *Federated Department Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981), citing *Baldwin* v. *Iowa State Traveling Men's Assn.*, 283 U.S. 522, 525 (1931) (emphasis added). In this case, Respondent was not relitigating the same issues in a subsequent action. Rather, she was litigating different issues (her contentions of employment discrimination), through a different procedure.

The Appellate Court's correct application of the law also conforms to the policy underlying the doctrine of *res judicata* and to sound principles of fairness. In fact, Petitioner noted this policy in its petition for leave to appeal to the Supreme Court of Illinois:

> *Res judicata* provides that when a court of competent jurisdiction enters a final judgment on the merits of a cause of action, the parties to the suit and their privies are *bound as to those issues which were raised, or could have been raised.* [Citation omitted] The concept of privity contemplates a mutual or successive relationship to the *same property rights which were the subject of prior litigation.*

Metropolitan Life Insurance Co. v. *Hansen*, 102 Ill. App. 3d 354, 356, 430 N.E.2d 57, 58 (1st Dist. 1981) (emphasis added) (quoted at App. F, p. 29a). As previously stated, the statute provided separate avenues for Respondent to pursue relief. If *res judicata* were to operate so as to prevent Respondent from seeking relief in the Circuit Court, then she would be deprived of a property right in the § 858.01a cause of action without due process of law. At the time the July 2nd Order was entered, § 858.01a had been added to Fair Employment Practices Act, giving

Respondent a right to proceed in state court. In fact, Respondent possessed a property right in that avenue of redress, a property right which is protected by the Due Process Clause of the Fourteenth Amendment. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950). Simply stated, the court's July 2nd Order did not, and could not, deprive Respondent of her property rights in § 858.01a.

Petitioner's argument to the contrary fails both legally and logically. As stated in *Metropolitan Life Insurance*, *res judicata* attaches only to those issues raised or those which could have been raised. At the time the July 2nd Order was entered, Respondent possessed the ability to commence an action in the Circuit Court for the desired relief. If the Order operated as *res judicata* of her action in the Circuit Court, then § 858.01a would have been meaningless. Petitioner would put Respondent in the peculiar and precarious position of anticipating litigation of the constitutionality of § 858.01a. Certainly, Respondent's arguments would have been dismissed. *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947) (issue must be ripe for adjudication). In short, at the time the July 2nd order was entered, Respondent believed she possessed the right to proceed pursuant to § 858.01a and acted accordingly.

Finally, the issue raised by Petitioner is an issue very unlikely to recur. Since this cause was filed, Illinois law has changed. The Illinois Supreme Court has declared § 9-102(B), the successor statute to § 858.01a, to be unconstitutional. *Wilson* v. *All-Steel, Inc.*, 87 Ill.2d 28, 428 N.E.2d 489 (1981). Complainants, therefore, no longer

have the option of filing an action in state court. Additionally, once a person files a charge with the Illinois agency, that person has a property interest in the cause of action and is entitled to " 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner,' 'for [a] hearing appropriate to the nature of the case.' " *Logan* v. *Zimmerman Brush Co.*, 455 U.S. at 437 (emphasis in original; citations omitted).

In conclusion, the January 10, 1983, and February 28, 1983 judgments of the Appellate Court do not warrant review by this Court. The Appellate Court decided correctly the issue of *res judicata*. Based on established legal precedent, sound policy, and principles of fairness, the court held the doctrine of *res judicata* does not prevent Respondent from adjudicating the merits of her employment discrimination charge.

CONCLUSION

For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOE ANN MCCLANDON,
Respondent,

By: .....
ROSLYN C. LIEB,
Counsel for Respondent

Of Counsel:
Northwestern University Legal Clinic*
339 East Chicago Avenue — Room 119
Chicago, Illinois 60611
Telephone: (312) 649-8576

* MARIAN W. PAYSON, a third year law student, assisted in the preparation of this brief.